No. 93-44

FILED
DEC 7 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court
for the District Of Columbia

BRIEF OF INTERVENORS-APPELLEES ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

MARK H. LYNCH*
RICHARD W. BUCHANAN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting

*Counsel of Record

(List of Counsel Continued on Inside Cover)

BEST AVAILABLE COPY

Of Counsel:

MARILYN MOHRMAN-GILLIS
ASSOCIATION OF AMERICA'S
PUBLIC TELEVISION STATIONS
Suite 200
1350 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 887-1700

PAULA A. JAMESON
NANCY HOWELL HENDRY
PUBLIC BROADCASTING SERVICE
1320 Braddock Place
Alexandria, VA 22314
(703) 739-5000

THOMAS E. HARVEY
PAMELA J. BROWN
CORPORATION FOR PUBLIC
BROADCASTING
901 E Street, N.W.
Washington, D.C. 20004
(202) 879-9600

QUESTION PRESENTED

Intervenors-appellees, the Association of America's Public Television Stations, Public Broadcasting Service and Corporation for Public Broadcasting, address the following question:

Whether Congress, consistent with the First Amendment, may require cable operators to carry a limited number of noncommercial educational television stations in order to redress the severe competitive imbalances that exist in the video marketplace and preserve the institution of local public broadcasting.

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, the Association of America's Public Television Stations, Public Broadcasting Service and Corporation for Public Broadcasting, through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES ii

TABLE OF AUTHORITIES vi

STATEMENT 2

A. The Special Position Of Public Television 3

B. Cable's Role As A Conduit 6

C. Cable's Role As A Gatekeeper And Prior Regulatory Responses 7

D. The Congressional Response To *Quincy* And *Century* 11

E. Section 5 Of The 1992 Cable Act 16

F. The Decision Below 18

SUMMARY OF ARGUMENT 20

ARGUMENT 21

I. SECTION 5 SHOULD BE UPHELD UNDER A STANDARD OF REASONABLENESS BECAUSE IT IS CONTENT-NEUTRAL ECONOMIC REGULATION DESIGNED TO PREVENT ANTI-COMPETITIVE

CONDUCT AND PROMOTE DIVERSITY IN THE MARKET FOR VIDEO INFORMATION 22

A. Section 5 Is Content-Neutral Economic Regulation 22

B. As Content-Neutral Economic Regulation, Section 5 Should Be Upheld Under *Associated Press* And Related Cases 26

II. AT MOST, SECTION 5 SHOULD BE REVIEWED UNDER THE *O'BRIEN-WARD* STANDARD 29

A. Unlike The Print Medium, The Cable Industry Has Always Operated With Substantial Government Assistance 29

B. Unlike The Print Medium, The Cable Industry Has Always Operated Under Substantial Government Control To Protect Local Broadcasting 32

C. Unlike The Print Medium, The Cable Industry Poses A Significant Bottleneck To The Public's Receipt Of A Diverse Array Of Information 34

D. The First Amendment Interests Of The Cable Industry With Respect To Must Carry Are Not Weighty Enough To Justify Review Under Heightened Scrutiny 36

E. Appellants' Arguments For Heightened Scrutiny Are Without Merit 37

III. SECTION 5 SHOULD BE UPHELD UNDER *O'BRIEN-WARD* 40

A. This Court Should Accord Due Deference To Congress' Legislative Judgment And Factual Findings 40

B. Congress Has Demonstrated A Substantial Government Interest 42

C. Section 5 Is Not Substantially Broader Than Necessary To Achieve The Substantial Government Interest On Which It Rests 45

CONCLUSION 49

TABLE OF AUTHORITIES

Cases: Page

Allen v. *Wright*, 468 U.S. 737 (1984) 36

Associated Press v. *United States*, 326 U.S. 1 (1945) 15, 20, 22, 25, 26, 27, 28, 29, 35, 43

Berkshire Cablevision v. *Burke*, 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985) 32

Bowen v. *Kendrick*, 487 U.S. 589 (1988) 41

Buckley v. *Valeo*, 424 U.S. 1 (1976) 40

Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 6, 33, 43

Carlson v. *Village of Union City*, 601 F. Supp. 801 (W.D. Mich. 1985) 32

Central Telecommunications, Inc. v. *TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) . . . 31, 32

Century Communications Corp. v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) 9, 10, 11, 12, 34, 35, 45

Century Federal, Inc. v. *City of Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987) 32

TABLE OF AUTHORITIES (cont.)

Cases: Page

Chicago Cable Communications v. *Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990) 31, 43

Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) 27

City of Cincinnati v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) 23

City of Renton v. *Playtime Theaters, Inc.*, 475 U.S. 41 (1986) 22

Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 41

Committee For An Independent P-I v. *Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983) 28

Community Communications Co. v. *City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) 32

Daniels Cablevision v. *FCC*, Civ. No. 92-2292, 1993 W.L. 393000 (D.D.C. Sept. 16, 1993), *appeal docketed*, No. 93-5350 (D.C. Cir. Nov. 22, 1993) 18

Erie Telecommunications, Inc. v. *City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988) 25, 32

Cases: Page

FCC v. *Midwest Video Corp.*, 440 U.S. 689 (1979) 37

FCC v. *National Citizens Commission for Broadcasting*, 436 U.S. 775 (1978) 27, 28, 39

Fortnightly Corp. v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) 7, 31

Group W Cable, Inc. v. *City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987) 32

International Society for Krishna Consciousness, Inc. v. *Lee*, 112 S. Ct. 2711 (1992) 22

Kovacs v. *Cooper*, 336 U.S. 77 (1949) 40

Lamprecht v. *FCC*, 958 F.2d 382 (D.C. Cir. 1992) 41, 42

Leathers v. *Medlock*, 111 S. Ct. 1438 (1991) . . 30, 39

Lorain Journal Co. v. *United States*, 342 U.S. 143 (1951) 27, 28, 38

Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 30, 31

Metro Broadcasting, Inc. v. *FCC*, 497 U.S. 547 (1990) 41, 43

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 35, 38

Cases: Page

Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982) . . 30, 32

Pacific Gas & Electric Co. v. *Public Utilities Commission*, 475 U.S. 1 (1986) 38

Preferred Communications, Inc. v. *City of Los Angeles*, 68 Rad Reg.2d (P&F) 121 (C.D. Cal. 1990) 32

PruneYard Shopping Center v. *Robins*, 447 U.S. 74 (1980) 38

Quincy Cable TV, Inc. v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) 9, 10, 11, 12, 34, 35, 47

Red Lion Broadcast Co. v. FCC, 395 U.S. 367 (1969) 29

Riley v. *National Federation of the Blind, Inc.*, 487 U.S. 781 (1988) 38

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 41

Rust v. *Sullivan*, 111 S. Ct. 1759 (1991) 21, 47

Simon & Schuster, Inc. v. *New York State Crime Victims Board*, 112 S. Ct. 501 (1991) 23

Southeastern Promotions Ltd. v. *Conrad*, 420 U.S. 546 (1975) 21

Cases: Page

Storer Cable Communications v. *City of Montgomery*, 806 F. Supp. 1518 (M.D. Ala. 1992) 25

Swift and Co. v. United States, 196 U.S. 375 (1905) 44

Teleprompter Corp. v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974) 7, 36

Telesat Cablevision, Inc. v. *City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991) 32

Texas v. *Johnson*, 491 U.S. 397 (1989) 22

United States v. *American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982) 28

United States v. *Midwest Video Corp.*, 406 U.S. 649 (1972) 33

United States v. *New York Times Co.*, 328 F. Supp. 324 (S.D.N.Y.), *remanded*, 444 F.2d 544 (2d Cir.), *aff'd*, 403 U.S. 713 (1971) 39

United States v. *O'Brien*, 391 U.S. 367 (1968) 16, 19, 20, 21, 29, 40, 45

United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 6, 32, 33, 43

Cases: Page

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 27

United States v. *Western Electric Co.*, 673 F. Supp. 525 (D.D.C. 1987) 37

Walters v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985) 41

Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 19, 22, 23, 24, 29, 40, 46

Warner Cable Communications, Inc. v. *City of Niceville*, 911 F.2d 634 (11th Cir. 1990) *cert. denied*, 111 S. Ct. 2839 (1991) 31

Younger v. *Harris*, 401 U.S. 37 (1971) 21

Statutes:

Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 . . . . . 9, 17
47 U.S.C. § 531 (1988) 17
47 U.S.C. § 532 (1988) 48
47 U.S.C. § 542(b) (1988) 30
47 U.S.C. § 547 (1988) 30

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 . . . . . *passim*
§ 2 35

Statutes: Page

§ 2(a) 42
§ 2(a)(2) 24
§ 2(a)(3) 7, 24
§ 2(a)(4) 13, 24
§ 2(a)(5) 24
§ 2(a)(6) 24
§ 2(a)(7) 15
§ 2(a)(8) 4, 24, 25, 42, 48
§ 2(a)(8)(A) 15
§ 2(a)(8)(B) 15
§ 2(a)(8)(C) 4, 15
§ 2(a)(8)(D) 15, 34
§ 2(a)(10) 33
§ 2(a)(16) 13, 34
§ 2(a)(17) 9, 34, 45
§ 2(a)(18) 45
§ 5 . . . . . *passim*
§ 5(b)(1) 16, 17
§ 5(b)(1) 46
§ 5(b)(2) 46
§ 5(b)(2)(A) 16
§ 5(b)(2)(B) 16
§ 5(b)(3) 46
§ 5(b)(3)(B) 17
§ 5(b)(3)(C) 17, 46
§ 5(b)(3)(E) 46
§ 5(c) 16
§ 5(d) 18, 47
§ 5(e) 17
§ 5(g)(5) 18
§ 5(l)(1) 16
§ 5(l)(2) 16

Statutes: Page

Communications Act of 1934, 47 U.S.C.
§§ 151 *et seq* (1988) 32
47 U.S.C. § 202(a) (1988) 37
47 U.S.C. § 224 (1988) 30
47 U.S.C. § 307(b) (1988) 3, 42
47 U.S.C.A. § 396(a) (1991 & Supp. 1993) . . 3
47 U.S.C. § 396(a)(5) (1988) 43
47 U.S.C.A. § 541 (1991 & Supp. 1993) . . . 30
47 U.S.C.A. § 546 (1991 & Supp. 1993) . . 30

Copyright Revision Act of 1976, 17 U.S.C.
§§ 111 *et seq.* (1988)
17 U.S.C. § 111 (1988 & Supp. IV 1992) . 8, 30
17 U.S.C. § 101 (1988) 31

Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) 6, 43

Legislative Material:

H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) . . . . . *passim*

H.R. Rep. No. 682, 101st Cong., 2d Sess. (1990) 12

H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984) *reprinted in* 1984 U.S.C.C.A.N. 4655, 4707 9

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5703-04 8

Legislative Material: Page

H.R. Rep. No. 572, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 1799, 1801 3

S. Rep. No. 221, 102d Cong., 2d Sess. (1992), *reprinted in* 1992 U.S.C.C.A.N. 834, 839 . . . . . 4, 5

S. Rep. No. 92, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135 . . . . . 6, 15, 16, 34

S. Rep. No. 67, 98th Cong., 1st Sess. (1983) 9

S. Rep. No. 222, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 1772, 1778-79 3

Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 102d Cong., 1st Sess. (1991) 11

Cable TV Consumer Protection Act of 1989: Hearings on S. 1880 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 2d Sess. (1990) 11

Legislative Material: Page

Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. 837 (1991) 4, 11, 24, 33, 35, 40, 41, 47, 48

Cable Television Regulation (Part 1): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. (1990) . . 11

Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. (1990) . . . 11

Must Carry: Hearing on Cable Carriage of Local Broadcast Signals Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 1st Sess. (1989) 11

Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommunications Act Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 1st Sess. (1989) 11

Legislative Material: Page

Cable Television: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 100th Cong., 2d Sess. (1988) 11

Administrative Material:

FCC Final Report and Order, 58 Fed. Reg. 17,350, 17,351 (1993) (to be codified at 47 C.F.R. Part 76) 17

47 C.F.R. § 73.606 (1992) 3

CATV, Second Report and Order, 2 F.C.C.2d 725 (1966) 8, 13, 39

Notice of Proposed Rulemaking: Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, 5 FCC Rcd. 259 (1990) 12

Report on Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962 (1990) 8, 9, 12

Notice of Inquiry: Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600 (FCC 89-345) (released Dec. 29, 1989) 12

Administrative Material: Page

Notice of Inquiry Into the Availability of Broadcast Television Signals on Cable Television Systems, MM Docket No. 88-138 (FCC 88-129) (released May 10, 1988) 12

Cable System Broadcast Signal Carriage Survey, A Staff Report by the Policy and Rules Division, FCC Mass Media Bureau (Sept. 1, 1988) . .12, 13, 35, 44, 49

CATV Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom. Malrite T.V.* v. *FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) 8

Cable Television Report and Order, 36 F.C.C.2d 143 *on reconsid.*, 36 F.C.C.2d 325 (1972), *aff'd sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975) . . . 8

Miscellaneous:

P. Goldstein, *Copyright* § 5.8.2 (1989) 10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 93-44

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal From The United States District Court
For The District of Columbia

BRIEF OF INTERVENORS-APPELLEES ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

Intervenors-appellees, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting (collectively "the public broadcasters"), submit this brief in support of the constitutionality of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47

U.S.C.A. § 535 (Supp. 1993) ("1992 Cable Act").[1/] Section 5, which enacts must carry requirements with respect to noncommercial educational television stations, is in important respects distinct from Section 4, its commercial counterpart. Section 5 should be assessed in light of the unique history of public television, which has long occupied a critical and protected niche in the nation's telecommunications infrastructure. That niche, and the considerable governmental and public commitment that helped create it, are especially threatened by cable's emergence as a bottleneck in the free flow of video information. Section 5 is therefore supported not only by the same substantial governmental interests that support Section 4, but also by additional governmental interests that apply only to public television. Further, Section 5 will have a substantially more limited impact on cable operators than Section 4. Thus, while the public broadcasters fully endorse the constitutionality of Section 4, they also submit that there are independent reasons to uphold Section 5.

STATEMENT

Section 5 of the 1992 Cable Act was enacted against the backdrop of public television's special position in the telecommunications infrastructure, the unique characteristics of cable television, and the threat that cable presents to the continued viability of local public television.

[1/] The Association of America's Public Television Stations ("APTS") and Public Broadcasting Service ("PBS") are non-profit membership organizations, whose members are the licensees of virtually all of the nation's public television stations. APTS serves as the national representative of these stations, presenting their views and participating in proceedings before Congress, executive and administrative agencies, and in other activities. PBS provides national program distribution and other program-related services to the nation's public television stations. The Corporation For Public Broadcasting ("CPB") is the private, non-profit corporation authorized by the Public Broadcasting Act of 1967 and financed primarily by federal appropriations to facilitate and promote a nationwide system of public broadcasting. Collectively, APTS, PBS, and CPB represent the broadcast stations that are the beneficiaries of Section 5 of the Cable Act.

A. The Special Role of Public Television.

Congress repeatedly has found that public television serves an important purpose because "the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal." H.R. Rep. No. 572, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 1799, 1801 (citing testimony of the presidents of each of the three networks). To overcome this market failure, Congress and the FCC have worked together to fashion a system of locally oriented public television stations that would be "uniquely fitted" to offer "programs of high quality, obtained from diverse sources." S. Rep. No. 222, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 1772, 1778-79; *see generally* 47 U.S.C.A. § 396(a) (1991 & Supp. 1993).[2/]

The first step toward a special, universally available, noncommercial television service was taken in 1952 when the FCC, pursuant to its statutory mandate to distribute the available broadcast television channels "in a fair, efficient, and equitable manner" among communities across the country, 47 U.S.C. § 307(b) (1988), reserved nearly one-third of the nation's broadcast television channels for noncommercial educational licensees. *See* Television Table of Allotments, 47 C.F.R. § 73.606 (1992). Since that time, a primary objective of our national telecommunications policy has been to assure that all Americans, wherever they live and whatever their economic circumstances, have access to locally-controlled public television services. Today, the FCC's initial reservation of channels has grown into a noncommercial broadcast infrastructure of more than 349

[2/] The volume of Supplement IV 1992 to the United States Code containing Title 47 has not yet been published, and therefore citations to recently amended sections of that title are to West's United States Code Annotated.

stations spread across the country's approximately 211 television markets. These noncommercial licensees include a diverse array of local school boards and other state and local agencies, public and private colleges and universities, and a variety of other local and community-based non-profit organizations dedicated to providing educational, informational, cultural, and alternative noncommercial programming. Over 98 percent of American homes have access to at least one noncommercial educational broadcast service either through cable or over-the-air broadcasts.[3/]

The substantial funding necessary to construct and operate this infrastructure has come from a wide variety of public and private sources. As recited in the 1992 Cable Act, the federal government has expended nearly $3 billion on public broadcasting since 1969. § 2(a)(8)(C). State and local governments have contributed nearly $5 billion since 1972. H.R. Rep. No. 628, 102d Cong., 2d Sess. 69 (1992) ("1992 House Report"). Despite these substantial governmental expenditures, the development and operation of the system would not have been possible without private contributions (primarily from viewers), totalling over $6 billion during the same period. *Id.* *See* 1992 Cable Act § 2(a)(8).

Local stations serving their communities are the bedrock of the public television system. As Congress recognized, local stations are "[a]t the heart of public broadcasting." S. Rep. No. 221, 102d Cong., 2d Sess. 6 (1992), *reprinted in* 1992 U.S.C.C.A.N. 834, 839. These stations provide locally oriented news and public affairs programs, locally oriented instructional programming, programming providing outlets to local cultural and artistic groups, and coverage of local and state governments.

3/ *Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 837 (1991) ("1991 House Hearings").

Nowhere is the local orientation of public television more evident than in its commitment to educational programming. Nearly 70,000 schools with over 29 million elementary and secondary students use public television instructional programming every day. Public television stations have prepared thousands of adults, many of them disabled or of modest means and with no other effective option, to earn a General Educational Development certificate — the equivalent of a high-school diploma — through telecourses. In college education, public television stations and the PBS Adult Learning Service provide degree track courses through accredited colleges throughout the country. Since 1981, local stations, in conjunction with more than 1,800 colleges and universities, have brought telecourses to 1.4 million college students.

Public television stations also serve as vital local community institutions. All across the country, public television stations are actively engaged in their communities, serving as catalysts for local attention to and action on vital issues of local importance such as literacy, racial harmony, child care, health care, AIDS, and the environment. *See* S. Rep. No. 221, *supra*, at 6-7, *reprinted in* 1992 U.S.C.C.A.N. 839-40. In addition, public television has become a leader in providing innovative video services to groups of viewers that are too few or too impoverished to attract other broadcast service. For example, public broadcasting has been a principal source of programming for the disabled by developing closed captioning for the hearing impaired and descriptive video services for the visually impaired. *See* 1992 House Report at 101. Public broadcasting also remains a crucial source of programming for non-English speaking audiences by simulcasting selected programs in a second language. *Id.* Indeed, just prior to passage of the 1992 Cable Act, Congress found in related legislation that public television stations are "valuable local community resources . . . to address national concerns and solve local problems" and that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public

telecommunications services." Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)).

B. Cable's Role As A Conduit.

Cable television originated as a "community antenna" service — a conduit for the retransmission of broadcast television signals. *See United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 163-64 (1968).[4/] This core cable function was, and remains, of particular importance to the public broadcasting system. In its early years, the public broadcasting system covered only a fraction of the area covered by commercial broadcast stations, and cable extended public television's reach into some of those unserved areas. Although many more public television stations are now on the air, nearly two-thirds of them are located in the hard-to-receive UHF frequency band (broadcast channels 14-69). *See* 1992 House Report at 70. UHF signals are more easily obstructed by terrain, man-made obstacles and atmospheric conditions than are VHF signals (broadcast channels 2-13). Many households can receive UHF signals only by means of outdoor antennas, which viewers often find too difficult or too expensive to install or maintain and which are, in any event, banned or severely restricted in many communities and developments across the country. *See id.* at 54. Thus, cable remains an important conduit for the vast majority of public television stations that broadcast on UHF frequencies.[5/]

[4/] *Accord Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 707 (1984) ("cable operators simultaneously receive and channel to their subscribers a variety of signals from many sources without any advance notice about the . . . content of" the programming provided).

[5/] Today, cable operators also serve a conduit function for programming produced for sale by cable programmers. The average cable system presently has the capacity to carry about 36 channels, *see* S. Rep. No. 92, 102d Cong., 1st Sess. 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135 ("1991 Senate Report"), but there are more than 80 cable (continued...)

C. Cable's Role As A Gatekeeper And Prior Regulatory Responses.

Cable's primary role as a conduit gives it a unique status as the "gatekeeper" into cable homes. As Congress has found, "[a]ll evidence indicates that, once a television set is connected to a cable system, consumers will not watch signals available only over-the-air." 1992 House Report at 54. With over 60% of all television households now receiving cable, *see* 1992 Cable Act § 2(a)(3), cable operators have enormous control over what programming viewers can see. This gatekeeper function, unless otherwise restrained, gives cable systems the ability to "cherry pick" broadcast stations, dropping or giving unfavorable channel placement to any station perceived to be in competition with the cable operator's preferred programming, or otherwise considered to be less desirable, less popular, or less profitable.

Cable's power as gatekeeper has been greatly enhanced by its freedom to use the programming of broadcast stations without their consent. When cable was a pure "conduit," doing nothing but retransmitting broadcast signals, the Supreme Court found this passive activity to be so devoid of expressive content that it did not constitute a "performance" for purposes of the copyright laws.[6/] And when Congress

---

[5/](...continued)
programmers. J.A. at 303. Consequently, not all cable programmers can obtain carriage on most cable systems, even without any requirement that cable operators carry broadcast signals. Recently, a few cable operators have begun to produce and transmit their own original programming. However, there has been no showing that the must carry requirements of the 1992 Cable Act threaten to displace any of the original programming produced by cable operators.

[6/] *See Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp.* v. *Columbia Broadcasting Sys., Inc.*, 415 U.S. 394, 402-05 (1974) (extending *Fortnightly* to cable systems that import distant broadcast signals).

did finally subject cable to copyright liability for carrying broadcast signals, it granted cable a "compulsory" license that perpetuated cable's ability to carry all local signals without permission, without cost, and without any restrictions as to channel placement. *See* Copyright Revision Act of 1976, 17 U.S.C. § 111 (1988 & Supp. IV 1992). The FCC has concluded that the compulsory license scheme "forced the cable television industry and the broadcast television industry into a significantly imbalanced contract" and contributed significantly to the cable industry's "explosive" growth. *Report on Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, 5038 (¶ 147) (1990) ("1990 FCC Cable Report").

In adopting the 1976 Copyright Act, Congress was aware that cable systems might abuse their power and deny local broadcast stations access to the viewers they were licensed to serve. But Congress relied on the fact that, in the mid-1960s, the FCC had adopted a careful array of regulations governing cable's use of broadcast signals — foremost of which were the must carry rules — that were designed to protect the universal reach of the local broadcast system.[7/]

With minor fine-tuning by the FCC, often at the request of the cable industry, the must carry rules remained in place for twenty years.[8/] It was during this period of assured universal availability that the nation invested massively in the

---

[7/] *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5703-04; 1992 House Report at 48; *see also CATV, Second Report and Order*, 2 F.C.C. 2d 725 (1966).

[8/] *See, e.g., Cable Television Report and Order*, 36 F.C.C.2d 143, *on reconsid.*, 36 F.C.C.2d 325 (1972), *aff'd sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975); *see also CATV Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 663 (1980), *aff'd sub nom. Malrite T.V.* v. *FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (reaffirming importance of must carry rules).

public television system and that system truly began to fulfill its considerable promise. Cable, too, prospered under the must carry regime, extending its reach from fewer than two million households in 1965 to over 36 million households, or 43 percent of the nation, by 1985.

In 1984, Congress substantially deregulated the cable industry and preempted most state and local controls that were viewed as restraints on its growth. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.). However, while deregulating the cable industry, Congress left the compulsory license in place. In so doing, Congress relied on the fact that the FCC's must carry rules would remain as a crucial counterweight to cable's freedom from copyright liability. "Given the current compulsory licensing system for cable systems under the copyright laws, if the 'must carry' rules were eliminated, local cable operators might not carry some local broadcast stations." S. Rep. No. 67, 98th Cong., 1st Sess. 11 (1983). Because of "the importance of local programming," Congress saw "a need to continue the existing 'must carry' rules to protect the public interest." *Id.* at 11-12; *see* H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984) *reprinted in* 1984 U.S.C.C.A.N. 4655, 4707; *see also* 1992 Cable Act § 2(a)(17).

This careful balance between the compulsory license and the FCC's must carry rules was upset in 1985 in *Quincy*,[9/] and again in 1987 in *Century*,[10/] when the D.C. Circuit found two different versions of the Commission's must carry rules invalid under the First Amendment. Although both decisions stressed that must carry requirements were not *per*

[9/] *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[10/] *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

se invalid under the First Amendment,[11] both concluded that the Commission had failed to justify its rules on the factual record.[12] The net effect of these decisions was to eliminate the must carry rules and throw the video industry into significant imbalance. As the FCC found in 1990, the elimination of must carry rules "drastically" and unfairly changed the relationship between the cable and broadcast industries and threatened the universal availability of public broadcast signals. *See* 1990 FCC Cable Report, 5 FCC Rcd. at 5037-38 (¶ 146); *see also* P. Goldstein, *Copyright* § 5.8.2 at 644 (1989) ("The judicial determination that the Commission's 'must carry' rules violate the first amendment undercut an important foundation stone of [the compulsory license]."). The FCC therefore unequivocally recommended that Congress enact must carry requirements for public television. *See* 1990 FCC Cable Report, 5 FCC Rcd. at 5044 (¶ 163).[13]

---

[11] *See Century*, 835 F.2d at 304 ("We do not suggest that must-carry rules are per se unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial government interests."); *Quincy*, 768 F.2d at 1463 ("[W]e have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment.").

[12] The FCC at that time had little enthusiasm for the must carry rules, as reflected in its decisions not to seek certiorari in either case.

[13] Predictably, appellants make much of the D.C. Circuit's decisions in *Quincy* and *Century*. There are, however, major differences between Section 5 of the 1992 Cable Act and the rules that were found suspect in those cases. First, Section 5's impact is far narrower than those rules. For example, the rules struck down in *Quincy* required some cable systems to devote all of their channel capacity to must carry signals and made no allowances for limiting carriage of duplicative programming. *See Quincy*, 768 F.2d at 1440, 1445-46 n.24, 1460. Second, unlike those rules, which were based on FCC predictions and intuitions that were found by the D.C. Circuit to lack any empirical basis, both Sections 4 and 5 are the product of extensive study by the Congress, which in turn drew on wide-ranging studies by the FCC, all undertaken after the *Quincy* and *Century* decisions. *See infra* notes 14, 15. In particular, the record compiled by Congress and the FCC shows that public television stations

(continued...)

D. The Congressional Response To *Quincy* And *Century*.

In response to the *Quincy* and *Century* decisions, and as part of a larger inquiry looking toward "reregulation" of the cable industry, Congress undertook a comprehensive five-year investigation into the ownership structure and business practices of the cable industry generally and into the cable-broadcast relationship in particular. Both houses of Congress held numerous, lengthy hearings and compiled evidence from dozens of witnesses representing all sectors of the communications industry.[14] The Congressional deliberations also drew heavily on three different inquiries conducted by the FCC after *Quincy* and *Century*, including the Commission's

---

[13](...continued)
have been subjected to serious harm at the hands of cable operators in the absence of must carry rules. *See infra* p. 13.

[14] The legislation was preceded by eight sets of hearings in the House and Senate conducted between 1988 and 1991: (1) 1991 House Hearings, *supra* n.3; (2) *Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 102d Cong., 1st Sess. (1991); (3) *Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990) ("1990 House Hearing"); (4) *Cable TV Consumer Protection Act of 1989: Hearings on S. 1880 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 2d Sess. (1990); (5) *Cable Television Regulation (Part 1): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990); (6) *Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommunications Act Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989); (7) *Must Carry: Hearing on Cable Carriage of Local Broadcast Signals Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989); (8) *Cable Television: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988).

exhaustive 1990 Cable Report.[15/] Ultimately, both the House and Senate produced comprehensive reports on the 1992 Cable Act. *See* 1992 House Report; 1991 Senate Report.[16/]

The results of this inquiry were clear and unequivocal. *First*, Congress found that the cable industry has monopoly status in the market:

- "For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems." 1992 Cable Act § 2(a)(2).

- The cable industry has become "a dominant nationwide video medium" that penetrates over 60 percent of the households with televisions. *Id.* § 2(a)(3).

[15/] *See* (1) *Notice of Proposed Rulemaking: Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 5 FCC Rcd. 259 (1990); (2) *Notice of Inquiry: Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600 (FCC 89-345) (released Dec. 29, 1989); (3) *Notice of Inquiry Into the Availability of Broadcast Television Signals on Cable Television Systems*, MM Docket No. 88-138 (FCC 88-129) (released May 10, 1988); *see also* 1990 FCC Cable Report, 5 FCC Rcd. 4962. At Congress' request, the FCC staff also produced a report on cable operators' conduct toward broadcasters in the wake of *Quincy* and *Century*. *Cable System Broadcast Signal Carriage Survey, A Staff Report by the Policy and Rules Division, FCC Mass Media Bureau* (Sept. 1, 1988) ("FCC Signal Carriage Survey").

[16/] In addition, there is a report accompanying a cable bill that passed the House in the 101st Congress. H.R. Rep. No. 682, 101st Cong., 2d Sess. (1990).

- "The cable industry has become highly concentrated" and "vertically integrated," thereby potentially reducing "the number of media voices available to consumers" and making "it more difficult for noncable-affiliated programmers [such as public broadcasters] to secure carriage on cable systems." *Id.* § 2(a)(4) & (5).

- "As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, . . . the economic viability of free local broadcast television . . . will be seriously jeopardized." *Id.* § 2(a)(16).

Second, Congress found in this monopolistic environment extensive evidence of discriminatory behavior against public television stations, especially those that offer educational and instructional programming. *See* 1992 House Report at 70. An FCC study submitted to Congress revealed that between 1985 and 1988, 153 public television stations, nearly half of all such stations, were dropped or denied carriage 463 times by 347 cable systems. FCC Signal Carriage Survey at 10.[17/] The FCC study also showed that 182 stations had been involuntarily repositioned on 541 occasions between 1985 and 1988. *Id.* at 19.

Third, Congress found that a must carry requirement for public television stations would impose only a minimal burden on the cable industry. *See* 1992 House Report at 71. Data supplied to the Congress showed that a blanket requirement

---

[17/] When a noncommercial station is dropped from a cable system, cable subscribers are cut off from public television and public television is cut off from viewers who provide it with financial support. As a result, the financial viability of public television station is threatened, to the detriment of both its cable and over-the-air viewers.

for carriage of *all* substantially unduplicated public television programming would have the following effects:

- 84 percent of the nation's cable systems would be required to carry one public television station;

- 13 percent would be required to carry two public television stations; and

- 3 percent would be required to carry more than two public television stations, and all of those cable systems are located in seven large television markets: New York City, Los Angeles, Chicago, San Francisco, Boston, Washington, D.C. and New Orleans.

Id. The 1992 Cable Act has even less impact than this hypothetical "blanket" requirement because it limits the number of public television stations that must be carried (depending on cable channel capacity) and eliminates substantial duplication. Indeed, the impact is so minimal that the National Cable Television Association, an appellant here, agreed in 1990 to support must carry legislation limited to public television. *See* 1990 House Hearing at 128 (statement of James P. Mooney, President and CEO of NCTA).[18/]

Fourth, Congress found that a must carry requirement for public television stations will serve important public interests that are jeopardized in the absence of such a requirement.

- "There is a substantial governmental and First Amendment interest in ensuring that cable

---

[18/] The minimal impact of Section 5 refutes appellant Discovery's erroneous contention that this provision is more onerous than the FCC's 1986 must carry rules. *See* Discovery Br. at 17.

subscribers have access to local noncommercial educational stations . . . ." 1992 Cable Act § 2(a)(7).

- "[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens." *Id.* § 2(a)(8)(A).

- "[P]ublic television is a local community institution . . . that provides public service programming that is responsive to the needs and interests of the local community." *Id.* § 2(a)(8)(B).

- "[I]n recognition of public television's integral role in serving the educational and informational needs of local communities," the Federal Government, as well as local governments and citizens, have made enormous investments in public broadcasting. *Id.* § 2(a)(8)(B) & (C).

- "[A]bsent carriage requirements there is a substantial likelihood that citizens, who have supported local public television stations, will be deprived of those services." *Id.* § 2(a)(8)(D).

Fifth, Congress also gave careful and extended consideration to the constitutionality of the must carry provisions. *See, e.g.*, 1992 House Report at 58-74; 1991 Senate Report at 53-62. In Congress' view, the must carry requirements are nothing more than "economic regulations designed to promote competition and a diversity of voices in communications services," and, as such, should be upheld under the minimal standard of First Amendment review set forth in *Associated Press* v. *United States*, 326 U.S. 1 (1945). 1991 Senate Report at 55; *see* 1992 House Report at 72. In addition, Congress cited Section 5's content-neutrality, its

service of substantial government interests, and its minimal burden on the cable industry as grounds for upholding that provision under *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See* 1992 House Report at 62-67, 72-74; 1991 Senate Report at 57-62.

E. Section 5 of the 1992 Cable Act.

Section 5 of the 1992 Cable Act amends the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, by adding a new Section 615.[19/] This section requires cable operators to carry the signals of all "qualified local noncommercial educational" ("NCE") television stations whose signals the cable system carried as of March 29, 1990, although this requirement can be waived by agreement of both parties. 1992 Cable Act § 5(c).[20/] Section 5 also requires cable operators to carry the signals of NCE stations that request carriage. *Id.* § 5(b)(1). The number of stations that must be carried depends on the channel capacity of the cable system.

Cable systems with twelve or fewer useable activated channels are required to carry the signal of only one NCE station. *Id.* § 5(b)(2)(A). In the event that a cable system of 12 or fewer usable activated channels is beyond the reach of any local NCE station, the cable operator must import and carry the signal of one distant NCE station to be chosen by the operator. *Id.* § 5(b)(2)(B)(i) & (ii). To satisfy this

---

[19/] For convenience, we will refer to the provision as Section 5 rather than Section 615.

[20/] A qualified noncommercial educational television station is (1) a station licensed by the FCC as such, owned by a public agency or nonprofit entity, and eligible to receive a grant from the Corporation for Public Broadcasting; or (2) a station that is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes. *Id.* § 5(l)(1). The term "local" is further defined in the Act. *Id.* § 5(l)(2).

requirement, a cable operator is not required to remove any programming service that it carried on March 29, 1990, although the operator is required to carry such a non-local station with the first channel that becomes available. *Id.* § 5(b)(2)(B)(iii).

Cable systems with thirteen to thirty-six channels are required to carry at least one NCE station, but not more than three. *Id.* § 5(b)(3)(A)(i). However, a cable operator is not required to carry more than one local NCE affiliated with the same state public television network if there is substantial duplication of the programming carried on the two stations. *Id.* § 5(b)(3)(C).[21/] Cable systems that are beyond the reach of a local NCE are also required to import the signal of one distant NCE. *Id.* § 5(b)(3)(B).

Cable systems with capacities of more than thirty-six channels are required to carry all local NCE stations that request carriage. *Id.* § 5(b)(1). However, when such operators are required to carry three stations, they are not required to carry additional stations with substantially duplicative programming. *Id.* § 5(e).

The limited burden of Section 5's must carry obligations on cable operators is further reduced by the statute's inter-relationship with the scheme for public, educational and government ("PEG") channels established in the Cable Communications Policy Act of 1984. Under that statute, a franchising authority may require a cable operator, as one of the terms of its franchise, to designate channels for public, educational, or governmental use. 47 U.S.C. § 531 (1988). When a cable operator is required under Section 5 of the Cable Act to add the signal of an NCE station, the cable operator may do so, subject to approval by the franchising

---

[21/] Substantial duplication has been defined by the FCC. *See* FCC Final Report and Order, 58 Fed. Reg. 17,350, 17,351 (1993) (to be codified at 47 C.F.R. Part 76).

authority, by placing that additional signal on a PEG channel that is not in use for its designated purpose. 1992 Cable Act § 5(d). In these circumstances, the must carry obligation is fulfilled without any additional loss of current channel availability by the cable operator.[22/]

Section 5 also creates certain channel positioning rights. Each NCE station having a mandatory carriage right under Section 5 must be carried, at its election, on its current over-the-air channel, its channel position as of July 19, 1985, or on such other channel number that is mutually agreed upon by the station and the cable operator. *Id.* § 5(g)(5).

F. The Decision Below.

On April 8, 1993, the three-judge district court held that Sections 4 and 5 of the Cable Act do not violate the First Amendment freedoms of speech and press. The court prefaced its opinion with a careful review of the "exhaustive" Congressional fact-finding process (discussed above) that resulted in the enactment of the Cable Act. Jurisdiction Statement Appendix ("J.S. App.") 10a. In particular, the court took note of the evidence before Congress that cable has become the "dominant nationwide video medium," and that the industry is characterized by little intra-industry competition, horizontal and vertical integration, and

---

[22/] Neither the section of the 1984 Cable Act authorizing the reservation of PEG channels nor the action of any franchising authority pursuant to that section is being challenged on this appeal. However, appellant Time Warner's omnibus complaint in this action did include such a challenge, and that claim was rejected by the single-judge district court. *See Daniels Cablevision* v. *FCC*, Civ. No. 92-2292, 1993 WL 393000 (D.D.C. Sept. 16, 1993), *appeal docketed*, No. 93-5350 (D.C. Cir. Nov. 22, 1993). As stated by the district court, "[t]he PEG and leased access provisions were enacted to serve a significant regulatory interest, *viz.*, affording speakers with lesser market appeal access to the nation's most pervasive video distribution technology. Enabling a broad range of speakers to reach a television audience that otherwise would never hear them is an appropriate goal and a legitimate exercise of federal legislative power." *Id.* at *4 (citations omitted).

substantial barriers to entry. *Id.* at 11a-12a. These attributes have created a cable "bottleneck" in the flow of video information that has "artificially diminish[ed] the audiences of local broadcasters, . . . decrease[d] their revenues," and placed free local broadcast television "in serious jeopardy." *Id.* at 25a. As aptly summarized by the district court, "unconstrained, cable holds the future of local broadcasting at its mercy." *Id.* at 26a.

In light of this record, the district court held that the Act "is simply industry-specific antitrust and fair trade practice regulatory legislation" that is "justified by the existing structure of the cable business itself" and designed to "create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anticompetitive practices." *Id.* at 13a. As such, "the must carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages" that the cable industry might convey. *Id.*

The district court applied the First Amendment balancing test for content-neutral regulation established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), as modified by *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). The must carry requirements meet this test, the court held, because they are supported by substantial government interests, including the promotion of fair competition among video "speakers" and the preservation of local broadcasting, J.S. App. 23a, and because they serve those substantial government interests effectively without unnecessarily burdening a significant amount of the cable industry's speech, *id.* at 27a. On the latter point, the district court specifically noted the minimal burden imposed by Section 5. *Id.*

Judge Williams dissented. Although he agreed with Congress and the majority that cable industry "bottlenecks" in the free flow of video information pose "a very real problem," he asserted that the remedy chosen by Congress —

must carry — is not the least restrictive alternative available for solving the problem. J.S. App. 50a, 66a. Judge Williams also disagreed with Congress' (and the majority's) factual finding that cable poses substantial dangers to the continued vitality of local broadcasting. *Id.* at 60a-67a. Thus, he concluded that the must carry provisions should be reviewed, and struck down, under strict First Amendment scrutiny. In so doing, however, Judge Williams plainly rejected plaintiffs' contention that Congress is constitutionally barred from imposing access requirements on cable operators. *Id.* at 51a.

SUMMARY OF ARGUMENT

1. Section 5 should be judged under a First Amendment standard much less rigorous than that applied to the traditional print media. As an initial matter, heightened scrutiny is not warranted in this case because Section 5 is a content-neutral economic regulation, addressed to the structure of the cable industry. Section 5 is not intended to suppress particular speech transmitted by cable operators or programmers, or to promote particular speech transmitted by public television stations, but rather to overcome competitive barriers erected by the cable industry to the widespread dissemination of public television programming. This Court has held, in a series of cases, that reasonable economic regulation designed to eradicate anticompetitive conduct and promote First Amendment values should be upheld under minimal First Amendment scrutiny. *See, e.g., Associated Press* v. *United States*, 326 U.S. 1 (1945). Section 5 easily meets this standard.

2. At most, this Court should apply a First Amendment standard no more exacting than that established in *United States* v. *O'Brien*, 391 U.S. 367 (1968). Such a standard is appropriate here because of Section 5's content-neutrality, and because of the many factors distinguishing the cable industry from the traditional print media. These factors include

cable's receipt of substantial government benefits, the longstanding regulatory relationship between government and cable, the bottleneck characteristics of cable operators, and cable's longstanding and predominant role as a passive conduit of video information.

3. As clearly established in the Congressional findings underlying Section 5, as well as in the Act's legislative history, Section 5 meets the *O'Brien* standard. First, Section 5 serves several substantial government interests, including the promotion of localism, diversity, and fair competition in the video marketplace and the protection of the nation's substantial investment in and commitment to public television services. Second, Section 5 is not substantially broader than necessary to achieve these legitimate government ends.

ARGUMENT

To a large extent this case turns on the determination of the appropriate standard of First Amendment scrutiny warranted by the nature of the regulation at issue and the special characteristics of the cable industry. As the Court has recognized, "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975). However, before turning to the question of the appropriate standard of review, we note that under any standard, appellants face a heavy burden because they challenge Section 5 of the 1992 Cable Act on its face. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1767 (1991) (internal quotation and citation omitted). Indeed, as the Court made clear in *Younger* v. *Harris*, 401 U.S. 37, 52 (1971), courts passing on the facial constitutionality of

statutes are acting "fundamentally at odds with the function of the federal courts in our constitutional plan." In short, appellants face a heavy burden in challenging Section 5, a burden that — as we demonstrate below — they cannot overcome.

I. SECTION 5 SHOULD BE UPHELD UNDER A STANDARD OF REASONABLENESS BECAUSE IT CONTENT-NEUTRAL ECONOMIC REGULATION DESIGNED TO PREVENT ANTI-COMPETITIVE CONDUCT AND PROMOTE DIVERSITY IN THE MARKET FOR VIDEO INFORMATION.

Appellants' First Amendment analysis presumes that strict or intermediate scrutiny are the only possible standards that can be applied to their claims. That presumption is wrong. As this Court has recognized on numerous occasions, content-neutral economic regulations addressed to the structure of a particular industry — even an industry whose product is speech — are properly tested under a standard of reasonableness. *See Associated Press* v. *United States*, 326 U.S. 1 (1945). Under that standard, which is applicable here, Section 5 easily passes muster.

A. Section 5 Is Content-Neutral Economic Regulation.

It is well-settled that the core of First Amendment protection is a bar against regulation directed to suppressing the content of free expression. *See, e.g., Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). This Court has counseled that, in determining content neutrality, "[t]he government's purpose is the controlling consideration." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Thus, "[g]overnment regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Id.* (internal quotation and citation omitted); *accord City of Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986); *International Soc'y for Krishna Consciousness, Inc.*

v. *Lee*, 112 S. Ct. 2711, 2722 (1992) (Kennedy, J., concurring).

Appellants seek to avoid the teaching of *Ward*. First, they assert that the *Ward* inquiry into the government's purpose and justifications is appropriate only for statutes that regulate the time, place or manner of speech, or that primarily regulate conduct and affect speech only incidentally. *See, e.g.*, NCTA Br. at 27-28; Time Warner Br. at 17, Discovery Br. at 30. This argument, however, overlooks the Court's statement that the inquiry for determining content neutrality set forth in *Ward* applies "in speech cases generally." 491 U.S. at 791.

Appellants also assert that under *Simon & Schuster, Inc.* v. *New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), and *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), the government's justification for Section 5 cannot be the controlling consideration for determining its content-neutrality. That argument is wrong. In *Simon & Schuster*, the Court did not even address the question of the law's content-neutrality, *see* 112 S. Ct. at 511 n.**, and thus did not modify the *Ward* analysis. In *Discovery Network*, the Court affirmed the thrust of *Ward* by stating that "[i]t is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content-neutral." 113 S. Ct. at 1517. The constitutional defect in the regulation at issue in *Discovery Network* was that it was aimed at newsracks carrying a particular type of publication. *Id.*

Under appellants' analysis, a law should be deemed content-based (and therefore subject to strict scrutiny) if it has any impact on the business of a media entity — *i.e.*, speech. But that analysis is hopelessly overbroad. As *Ward* correctly recognizes, only an inquiry into the government's *justification* can properly distinguish content-based from content-neutral regulations.

Under *Ward*, Section 5 is clearly content-neutral. Indeed, as found by the district court, "[a]ll parties agree (at least, the plaintiffs concede) that the must-carry provisions are not *viewpoint*-based: must-carry rights are conferred upon all full-power local broadcasters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either." J.S. App. 15a-16a (emphasis in original). Despite appellants' protestations, Section 5's requirements are not based on content. Under the Act, cable operators are obliged to carry their minimal quota of noncommercial educational television stations regardless of the content of the stations' speech. If other programming must be denied carriage in order to comply with Section 5, the statute prescribes no test whatsoever as to how that decision is to be made. *See* J.S. App. 16a.[23/]

As set forth in substantial detail in the Act itself, Section 5 is based on Congress' concern over the monopolistic position of cable systems, the corresponding likelihood that citizens will be deprived of the diversity provided by local public television programming, and the consequent threat to the viability of local public television stations, which Congress found to be vital community institutions in which the nation has made an enormous investment. 1992 Cable Act § 2(a)(2), (3), (4), (5), (6), & (8). *See supra* pp. ___.[24/] In short, Congress' purpose in enacting Section 5 was to preserve and promote continued access to the

---

[23/] Appellants go to extremes in support of their claim that Section 5 is content-based. For example, appellant Turner contends that Section 5 is content-based because its requirements "turn[] upon a determination" of substantial duplication of programming. Turner Br. at 25. That contention is specious. The "substantial duplication" provision of Section 5 is a burden-reducing measure (designed to relieve cable operators of the obligation to carry noncommercial educational stations with duplicative programming) and not a *basis* for the imposition of must carry requirements in the first instance.

[24/] The legislative history of the Act contains a similar analysis. *See, e.g.*, 1992 House Report at 68-72.

institution of public television — not to any particular programming — in the face of economic conditions that are denying viewers that access now and may increasingly do so in the future. *See, e.g.*, 1992 Cable Act § 2(a)(8); 1992 House Report at 68.

Section 5 cannot be considered content-based because it fosters — through public television — substantial government interests in education, localism, diversity, and community service. These interests are institutional ones, similar to those served by schools or libraries, and are not, therefore, associated with any particular speech or point of view. No one could argue that government support for a library or school constitutes government preferment for the books the library chooses for its shelves or the school chooses for its courses. Similarly, because Section 5 does not dictate the content of public television programming that must be carried by cable operators, or the content of programming not carried by cable operators, the governmental support for the institution of public television through Section 5 does not offend the First Amendment. Instead, Section 5 is nothing more than content-neutral economic regulation — akin to the antitrust laws or other commercial regulations — designed to eradicate market imbalances and ensure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press*, 326 U.S. at 20.[25/]

[25/] *Cf. Storer Cable Communications* v. *City of Montgomery*, 806 F. Supp. 1518, 1546, 1559 (M.D. Ala. 1992) (trade regulation directed specifically at cable operators found content-neutral); *Erie Telecommunications, Inc.* v. *City of Erie*, 659 F. Supp. 580, 600 (W.D. Pa. 1987) (concluding that provisions of franchise agreement requiring dedication and maintenance of public access channels are content-neutral), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988).

B. As Content-Neutral Economic Regulation, Section 5 Should Be Upheld Under Associated Press And Related Cases.

Because Section 5 is content-neutral economic regulation addressed to the structure of the cable industry, the proper framework for the analysis of appellants' claims is provided by *Associated Press* v. *United States* and related cases. Under these authorities, reasonable economic regulation of a particular industry, aimed at eradicating anticompetitive conduct and promoting First Amendment values, should be upheld under minimal First Amendment scrutiny.

In *Associated Press*, the issue was whether the government, through application of the antitrust laws, could take steps to regulate AP's monopolistic news and membership practices without running afoul of the First Amendment. These practices prevented non-members from obtaining news from AP or its members, and made it difficult for newspapers in competition with AP members to become members themselves. At bottom, as found by the Court, AP's rules furnished members with "the exclusive right to publish news in a given field" and a consequent "competitive advantage over their rivals." 326 U.S. at 17 (footnote omitted).

AP argued that the government's efforts to ameliorate this competitive imbalance violated its First Amendment rights. Reasoning that "[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," *id.* at 20, the Court rejected AP's claim without any hint of heightened scrutiny. The Court stated:

> Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge

> if they impose restraints upon that constitutionally guaranteed freedom. . . . *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.*

Id. (emphasis added, footnote omitted). *See Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155 (1951) (no heightened scrutiny applied in upholding antitrust consent decree requiring newspaper to publish advertising of businesses that also advertised on a rival radio station; the decree imposed "no restriction upon any guaranteed freedom of the press").

The same sort of minimal scrutiny applied in *Associated Press* has been used to reject other First Amendment challenges to content-neutral economic regulation of the communications industry that has the effect of limiting the ability to speak. For example, in *FCC* v. *National Citizens Comm'n for Broadcasting*, 436 U.S. 775 (1978), the Court upheld the FCC's rules restricting cross-ownership of same-market media outlets as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 802. These rules had the direct effect of preventing some speakers from speaking where they wished. In sustaining the cross-ownership rules, the Court noted that they were "in form quite similar to the prohibitions imposed by the antitrust laws" and that "the application of [such] laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment." *Id.* at 800 n.18 (citing *Associated Press* and *Lorain Journal*, and *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969)). *Cf. United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 201-04 (1956) (upholding, without discussion of the First Amendment, rules placing limitations on the total

number of broadcast stations a person may own or control).[26/]

Appellants argue that the *Associated Press* doctrine stands only for the unexceptionable proposition that media entities are not exempt from laws of general applicability. That reading of *Associated Press* and related cases is cramped and inaccurate. Both *Associated Press* and *Lorain Journal* involved First Amendment challenges to particular applications of the antitrust laws that specifically altered the expressive activity of a media organization — in *AP*, the news organization was ordered to share collective information that it would not have otherwise shared; in *Lorain Journal*, the newspaper was required to carry advertising that it would not have otherwise carried. Similarly, *National Citizens Comm'n for Broadcasting* involved direct regulation of media entities that specifically altered the expressive activities of those entities.

As in those cases, the recognition that Section 5's must carry rules are content-neutral economic regulations intended to promote diversity in the information marketplace should end the Court's consideration of plaintiffs' First Amendment claim. Under the *Associated Press* doctrine, the First Amendment poses no obstacle to Congress' reasonable efforts

---

[26/] Similarly, in *Committee For An Independent P-I* v. *Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983), the Ninth Circuit upheld the Newspaper Preservation Act, which created an antitrust exemption for joint operating agreements entered into by failing newspapers. Despite its incidental effect on the speech of smaller newspapers, the court found that "[t]he Act is an economic regulation which has the intent of promoting and aiding the press." *Id.* at 483. On the basis of this conclusion and the Act's content-neutrality, the court applied the *Associated Press* doctrine to reject plaintiffs' First Amendment challenge under a minimal level of scrutiny. *Id.*; *cf. United States* v. *American Tel. and Tel. Co.*, 552 F. Supp. 131, 183 (D.D.C. 1982) (the *absence* of a consent decree barring AT&T from entering the electronic publishing market would pose "a substantial danger" to the First Amendment principle of "diversity in sources of information").

to restore balance to the increasingly one-sided business relationships of cable systems and public broadcasters in order to further a compelling national goal. Far from impermissibly infringing on First Amendment interests, the must carry provisions quite clearly promote them. As the Supreme Court stated in *Red Lion Broadcasting Co.* v. *FCC*, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." 395 U.S. 367, 390 (1969).

II. AT MOST, SECTION 5 SHOULD BE REVIEWED UNDER THE *O'BRIEN-WARD* STANDARD.

Even if the Court determines that Section 5 should not be reviewed under the First Amendment standard set forth in *Associated Press* and related cases, there is no basis for employing a standard of review more stringent than that established in *United States* v. *O'Brien*, 391 U.S. 367 (1968) and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). As discussed above, Section 5 is content neutral economic regulation that affects speech, at most, incidentally. This conclusion, standing alone, should result in the application of *O'Brien-Ward* to appellants' claims. As discussed below, however, several additional factors, taken together, justify this intermediate standard over any heightened standard of review applicable to the print medium.

A. Unlike The Print Medium, The Cable Industry Has Always Operated With Substantial Government Assistance.

Contrary to the longstanding tradition of separation between government and the print medium, cable has for almost thirty years been the recipient of substantial government assistance. Unlike *any* business entity other than traditional public utilities, cable relies for dissemination

of its message upon the permanent physical occupation of governmental resources. In order to provide cable service to subscribers, cable wires and associated equipment must be hung from utility poles, housed in underground utility ducts, or otherwise placed in or across public rights-of-way.[27] Further, cable operators necessarily depend upon franchising authorities to exercise their powers of eminent domain in order to ensure cable's access to private property. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Cable operators also receive a host of other statutory benefits. For example, cable systems receive guaranteed access to utility company poles at government-prescribed rates. *See* 47 U.S.C. § 224 (1988). Congress also imposes a limit on the amount of the fees local franchising authorities can extract from cable operators. *See* 47 U.S.C. § 542(b) (1988). Even the existence of the franchising authority has been a benefit to the cable industry because a franchise is a prerequisite to operating a cable system, *see* 47 U.S.C.A. § 541 (1991 & Supp. 1993), and, as a practical matter, the number of such franchises is necessarily limited, thus insulating franchise holders from competition. Indeed, until the 1992 Act prohibited the practice, *id.*, franchise authorities were authorized to grant exclusive franchises available to cable operators. Congress has also severely restricted the ability of franchise authorities not to renew franchises, *see* 47 U.S.C.A. § 546 (1991 & Supp. 1993), and has required that cable systems receive compensation when such a non-renewal occurs, *see* 47 U.S.C. § 547 (1988).

In addition, under the provisions of the Copyright Act, cable operators are granted a compulsory license to retransmit local broadcast signals without fee. *See* 17 U.S.C. § 111(c)

---

[27] *See Leathers* v. *Medlock*, 111 S. Ct. 1438, 1441 (1991); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982).

& (d) (1988 & Supp. IV 1992). Thus, government (and the broadcasting industry) essentially subsidizes cable operators by granting them free and unrestricted access to local broadcasting. While Section 6 of the Cable Act alters this regime to some extent for commercial broadcasters, the retransmission consent scheme established by Section 6 does not apply to public broadcasters. Accordingly, NCTA's argument that the compulsory license is no longer a benefit to cable operators (NCTA Br. at 33-34) is completely irrelevant to noncommercial broadcasting and Section 5.[28]

The existence of these numerous government benefits is a characteristic unique to the cable industry and stands in stark contrast to the historic independence (and even antagonism) of the print medium vis à vis the government. While newspaper publishers make use of the streets and the mail to deliver their products, their dependence on government assistance does not nearly approach cable's dependence on government assistance. As numerous lower courts have found, these extensive government benefits to cable, especially when viewed in the aggregate, justify a less searching First Amendment standard than that traditionally applied to the print media.[29]

---

[28] Appellants also disingenuously assert that they are not receiving a "benefit" under the compulsory license scheme because, prior to the enactment of the 1976 Copyright Act, the retransmission of broadcast signals was not considered a public performance under the copyright law. *See, e.g.*, NCTA Br. at 33 n.27 (citing *Fortnightly* and *Teleprompter*). But *Fortnightly* and *Teleprompter* were decided under the 1909 Copyright Act; the 1976 Act, by broadening the definition of a "performance," clearly subjects the retransmission of broadcast signals to copyright liability. *See* 17 U.S.C. § 101 (1988). The Act then goes on to exempt cable operators from that liability by granting them the clearly beneficial compulsory license with respect to local broadcast signals. *See id.* § 111.

[29] *See, e.g., Warner Cable Communications, Inc.* v. *City of Niceville*, 911 F.2d 634 (11th Cir. 1990) *cert. denied*, 111 S. Ct. 2839 (1991); *Chicago Cable Communications* v. *Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); *Central Tele-*

(continued...)

B. Unlike The Print Medium, The Cable Industry Has Always Operated Under Substantial Government Control To Protect Local Broadcasting.

Since its inception as a conduit of broadcast signals, cable has been subject to longstanding government regulation. On at least two occasions, this Court has recognized that such regulation is necessary to ensure that cable's growth is consistent with the government's allocation and licensing policies for local broadcasting and public television.

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), the Court upheld the FCC's authority to regulate cable under the provisions of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1988). In so doing, the Court relied on the FCC's "reasonabl[e]" determination that the importation of cable signals threatened to

> destroy or seriously degrade the service offered by a television broadcaster, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations. In particular, the Commission feared that CATV

[29](...continued)
communications, Inc. v. *TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co.* v. *City of Boulder*, 660 F.2d 1370, 1377 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Telesat Cablevision, Inc.* v. *City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991); *Erie Telecommunications, Inc.* v. *City of Erie*, 659 F. Supp. 580, 599-600 (W.D. Pa. 1987), *aff'd*, 853 F.2d 1084 (3d Cir. 1988); *Carlson* v. *Village of Union City*, 601 F. Supp. 801, 809-12 (W.D. Mich. 1985); *Berkshire Cablevision* v. *Burke*, 571 F. Supp. 976, 985-88 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985); *but see Preferred Communications, Inc.* v. *City of Los Angeles*, 68 Rad Reg.2d (P&F) 121 (C.D. Cal. 1990); *Century Federal, Inc.* v. *City of Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987); *Group W Cable, Inc.* v. *City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987).

> might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters.

392 U.S. at 175-76 (internal quotation, citation and footnotes omitted). The Court also took note of the Commission's view that "the hazards to educational television [posed by cable] were sufficiently strong to warrant some special protection." 392 U.S. at 176 n.44 (internal citation omitted). The FCC's original must carry rules followed shortly thereafter, flowing directly from — and, indeed, being justified by — Congress' original reservation of broadcast channels for public television stations.

Similarly, in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972), the Court upheld the FCC's authority to regulate cable in order to "control[] [its] competitive impact . . . on broadcast services" and ensure that "viewers are provided suitably diversified programming." *Id.* at 664, 669. Such regulation is proper because it "preserves and enhances the integrity of broadcast signals and therefore is reasonably ancillary to the effective . . . regulation of television broadcasting." *Id.* at 670 (internal quotation and citation omitted). As the Court subsequently confirmed in *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984), "[t]here can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest."

Section 5 is based on the same rationale as the cable regulations at issue in *Southwestern Cable* and *Midwest Video*. As Congress specifically found, "[a] primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming," 1992 Cable Act § 2(a)(10), and cable poses a significant threat to "the economic viability of free local broadcast television."

Id. § 2(a)(16). Indeed, "absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services." *Id.* § 2(a)(8)(D). Congress' desire to preserve and protect its system of broadcast regulation and the institution of public television has no counterpart in any actual or hypothetical regulation of the print medium. Thus, there is no basis for applying a heightened print-based standard of First Amendment review to Section 5.

C. Unlike The Print Medium, The Cable Industry Poses A Significant Bottleneck To The Public's Receipt Of A Diverse Array Of Information.

A third factor distinguishing the cable industry from print is its increasingly dominant position as a distributor of information to household televisions. Cable's role as an information bottleneck results from the fact that, as a practical matter, most cable operators are completely insulated from competition. Indeed, Congress cited the "necessarily severely limited number of franchised cable systems able to operate in any one community," as grounds for ensuring, through must carry, that "the diversification principle . . . is not undermined in this increasingly important governmentally franchised medium." 1991 Senate Report at 51-52. Congress also relied on the fact that "[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services." 1992 Cable Act § 2(a)(17).[30/]

[30/] The D.C. Circuit in both *Quincy* and *Century* was profoundly skeptical of the FCC's lack of empirical support for its intuition that selector switches and continued use of outdoor antennas were not adequate means to preserve cable subscribers' access to local broadcast stations. That question has now been resolved by congressional fact-finding which drew on empirical studies conducted by the FCC after *Quincy* and (continued...)

Further, as discussed extensively by Congress in the Cable Act and its legislative history, cable operators — as a result of increased penetration into households, substantial barriers to entry, and vertical integration — now have both the market power and the economic incentive to deny carriage to a growing number of noncommercial broadcast stations. 1992 Cable Act § 2; 1992 House Report at 50-54. The FCC has compiled overwhelming evidence that the cable industry has denied carriage to public television stations in the wake of *Quincy* and *Century*. *See* FCC Signal Carriage Survey at 10; *supra* p. 13.[31/] In short, without must carry obligations, cable operators are increasingly acting as impediments, rather than facilitators, to the "widest possible dissemination of information from diverse and antagonistic sources." *Associated Press*, 326 U.S. at 20. A similar economic structure does not exist for print speakers. This factor also counsels against a heightened print-based standard of review.

To be sure, the Court rejected a similar economic scarcity argument in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), but that decision is not applicable here because cable's position as a gatekeeper to viewers is so much more dominant than newspapers' position as a gatekeeper to readers. Even in one-newspaper communities, there are a myriad of ways for print speakers to reach their audiences — flyers, leaflets, newsletters, alternative newspapers, and the like. In contrast, the only

---

[30/](...continued)
Century. *See, e.g.*, 1992 House Report at 54, 70-71. The D.C. Circuit's skepticism therefore is no longer justified.

[31/] While appellants dispute the evidence that commercial broadcasters suffered after the demise of the FCC's must carry rules, appellants, have not disputed that public television stations suffered grievously. *See* NCTA Br. at 39-40; Turner Br. at 42-43.

means by which a video speaker can reach its local audience is through the sole cable operator in the community.[32]

D. The First Amendment Interests Of The Cable Industry With Respect To Must Carry Are Not Weighty Enough To Justify Review Under Heightened Scrutiny.

Finally, a functional analysis of the cable industry reveals an additional factor justifying less than heightened First Amendment scrutiny: namely, that with respect to their obligations under Section 5, cable operators' First Amendment interests are minimal at best.[33] Must carry rules implicate cable's primary function — that of a passive distributor of broadcast signals. In this capacity, cable operators do not resemble either the print press or broadcasters.[34] Given the minimal expressive activity necessary to perform this distribution role, *see Teleprompter Corp.*, 415 U.S. at 402-05, cable operators are more analogous to common carriers than to publishers or broadcasters. Indeed, the Court has found that "[a] cable system may operate as a common carrier with

---

[32] As the district court correctly found, *Tornillo* also is distinguishable because of the patently content-based nature of the right-of-reply law at issue in that case. J.S. App. 22a n.25. *See infra* pp. 37-38.

[33] Although the *Turner* and *Discovery* appellants are cable programmers rather than cable system operators, their claims are derivative of, and contingent upon, the asserted rights of cable system operators. There are approximately 80 national and 48 regional cable networks that currently offer programming. J.A. at 303. Yet the average cable system has a capacity of approximately 40 channels. *Id.* As a result, cable programmers clearly live in a harsh, competitive environment in which many will not be carried, irrespective of Section 5. Because cable programmers cannot trace their non-carriage directly to Section 5, they lack standing to bring this facial constitutional challenge. *See Allen* v. *Wright*, 468 U.S. 737, 751-52 (1984).

[34] There has been no showing that the limited requirements of Section 5 (or even the more extensive requirements of Section 4) threaten to displace any of the relatively limited self-originated programming carried by cable operators.

respect to a portion of its service only." *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 701 n.9 (1979).

Cable operators (and programmers derivatively) assert that must carry rules infringe on the operators' First Amendment right to select programming of their choice for each channel in the system. However, a similar choice has been denied to common carriers, such as telephone companies. *See* 47 U.S.C. § 202(a) (1988) (nondiscrimination requirement for common carriers). Under this rubric, local telephone companies are obliged to carry *any* message presented to them. Because cable operators are acting akin to common carriers when retransmitting broadcast signals, a similar result should apply to their First Amendment objections to must carry. *See United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 586 n.273 (D.D.C. 1987) ("[C]ommon carriers are quite properly treated differently for First Amendment purposes than traditional news media."). [35] At the very least, in light of the minimal burden imposed by Section 5's must carry rules on the expressive activity of cable operators, the Court should not apply a heightened level of First Amendment scrutiny.

E. Appellants' Arguments For Heightened Scrutiny Are Without Merit.

Appellants offer two primary arguments in support of their claim to heightened First Amendment scrutiny, but each is without merit.

First, appellants contend that the must carry provisions impermissibly infringe on cable operators' "editorial

---

[35] This analysis is not affected by the holding in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979). In that case, the Court concluded that the FCC did not have jurisdiction to create a broad right of access to cable channels based on a common carrier rationale. The proper limits of FCC jurisdiction are not at issue here.

discretion" — their ability to chose or reject programming as they wish. *See*, *e.g.*, NCTA Br. at 18-21; Turner Br. at 30-31. For this, appellants primarily rely on *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), in which the Court struck down a state statute granting political candidates the right to reply to criticisms published in newspaper editorials. Unlike the statute in *Tornillo*, however, which authorized a right of access predicated on content — indeed, *political* content — Section 5 does not dictate that cable systems carry or not carry programming having any particular content. *Cf.* 1992 House Report at 69, 72 (discussing enormous variety of public television programming). Nor are cable operators "being compelled to affirm their belief in any governmentally prescribed position or view." *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 88 (1980).[36] Furthermore, *Lorain Journal*, 342 U.S. at 155-56, demonstrates that the First Amendment's protection for editorial discretion is not offended when a newspaper is required to carry material it would not otherwise carry in order to redress anticompetitive conduct.

In addition, the nature of the "editorial discretion" exercised by cable operators is substantially different from that exercised by newspapers. In contrast to newspaper editors, who actually read and often change copy before it is published, cable operators merely transmit the signals delivered to their headends. Further, as appellants' factual submissions make clear, the discretion exercised by cable operators in selecting programming in the first instance is

---

[36] For these same reasons, appellants' reliance on other "compelled speech" cases is misplaced. The statute at issue in *Riley* v. *National Federation of the Blind, Inc.*, 487 U.S. 781 (1988), was content based because it required entities engaging in particular speech (charitable solicitation) also to engage in other particular speech (the disclosure of certain information). Similarly, the compelled speech at issue in *Pacific Gas & Elec. Co.* v. *Public Utilities Comm'n*, 475 U.S. 1 (1986) was triggered by PG&E's expression of its own views, and thus "penalize[d] the expression of particular points of view." *Id.* at 9-10.

guided entirely by "customer satisfaction." *See*, *e.g.*, J.A. at 245-247, 264, 273. While cable operators are entitled to some measure of First Amendment protection, *see Leathers* v. *Medlock*, 111 S. Ct. 1438, 1442 (1991), their focus on maximizing customer satisfaction sets them apart from the tradition of a "cantankerous" and "obstinate" press that fearlessly informs the public and watchdogs the government — the tradition that has been accorded the highest level of First Amendment protection. *United States* v. *New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y.), *remanded*, 444 F.2d 544 (2d Cir.), *aff'd* 403 U.S. 713 (1971). Because of these differences in the "editorial discretion" exercised by cable operators and newspaper publishers, the level of First Amendment protection traditionally afforded to newspapers need not be applied to cable.

Second, appellants argue that the must carry provisions discriminate against the cable industry in order to promote the speech of broadcasters. NCTA Br. at 21-23; Turner Br. at 27-30. This "favoritism" argument, however, has been rejected by the Court on several occasions. In *Leathers* v. *Medlock*, for example, the Court applied rational basis review to a sales tax that applied only to cable operators and not to the print media. 111 S. Ct. at 1446. The Court explicitly stated that "a differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* The Court also rejected the argument that "intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas, violates the First Amendment." *Id.* at 1445. Similarly, in upholding the FCC's rules restricting cross-ownership of same-market media outlets in *National Citizens Comm'n for Broadcasting*, the Court made clear that "efforts to enhance the volume and quality of coverage of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be." 436 U.S. at 800 (internal quotation and citation omitted). Indeed, if it were true that strict scrutiny applied

to any regulation favoring one member of the media over another, then there would be no basis for the government's well-settled right to arbitrate between the claims of competing speakers under valid time, place, and manner restrictions. *See, e.g., Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (favoring the "natural speech" of residents and denizens of public fora over the "amplified" speech of persons driving sound trucks).[37/]

III. SECTION 5 SHOULD BE UPHELD UNDER *O'BRIEN-WARD*.

Under *O'Brien-Ward*, the must carry rules clearly satisfy the First Amendment because they serve substantial government interests and are no broader than necessary in doing so.[38/]

A. This Court Should Accord Due Deference To Congress' Legislative Judgment And Factual Findings.

Although appellants focus much of their argument under *O'Brien* to attacks on the Congressional record supporting must carry, that record must be viewed in its appropriate context. Passed by two-thirds of the members of both Houses

---

[37/] Appellants' favoritism argument relies on an overstated reading of *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976). But even the *Buckley* Court recognized that this "favoritism" principle applies only in "traditional free speech case[s]" and not in cases, such as those involving the broadcast media or, indeed, the cable industry, posing "unique and special problems." 424 U.S. at 50 n.55 (internal quotation and citation omitted). *See also* J.S. App. 17a-18a (finding that *Buckley* does not support appellants' favoritism argument).

[38/] As made clear above, Section 5 meets *O'Brien*'s requirement that "the governmental interest [underlying the regulation] is unrelated to the suppression of free expression." 391 U.S. at 377. It is also clear that Section 5 meets *O'Brien*'s requirement that the government regulation at issue be "within the constitutional power of the Government." *Id.*

of Congress, Section 5 is not some hastily-considered floor amendment. Instead, as demonstrated previously, Section 5 is the product of extensive study by both the Congress and the FCC in light of previous guidance from the courts. *See supra* pp. 11-12. Especially where, as here, Congress gave extensive and deliberate consideration to the question of the Cable Act's constitutionality, due consideration must be given to Congress' legislative judgment. *See Bowen* v. *Kendrick*, 487 U.S. 589, 617 (1988); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). That judgment "cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973).

Further, appellants must overcome the even greater deference owed to the extensive and detailed Congressional findings of fact underlying the Cable Act. Such deference is compelled by the fact that "Congress is an institution better equipped [than a court] to amass and evaluate the vast amounts of data bearing on [the] issue[s]." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); *accord Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 569 (1990); *Rostker*, 453 U.S. at 72-73. Although a court presented with a constitutional challenge to federal legislation is obliged to "review a legislature's judgment that the facts [it relied upon] exist," it must nevertheless "review Congress's judgment deferentially, without reweighing the evidence *de novo*." *Lamprecht* v. *FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992). Accordingly, there is no basis for appellants' suggestion that the Court should re-weigh the massive factual record analyzed by Congress.

Even in the absence of this deferential standard, the record underlying Congress' factual findings with respect to Section 5 is more than sufficient to justify Congress' decision to enact noncommercial must carry rules. In addition to drawing on the FCC's investigations, including the

Commission's exhaustive 1990 Cable Report, both Houses of Congress held numerous, lengthy hearings and compiled evidence from dozens of witnesses representing all sectors of the communications industry. *See supra* pp. 11-12. Moreover, the judgments reached in the 1992 Cable Act were not merely the product of recent investigations, but also of 40 years of close and continuous oversight of the relationship between the cable and broadcast industries. The conclusions gleaned from these years of study are set forth in Section 2 of the Act. Far from findings that "black is white or freedom is slavery," *Lamprecht*, 958 F.2d at 392 n.2, these conclusions are well-grounded in the evidence presented and, as established below, wholly sufficient to support Section 5.

B. Congress Has Demonstrated A Substantial Government Interest.

As set forth in the Act and its legislative history, the Cable Act's must carry provisions are intended to further several longstanding government interests: (1) promoting fair competition in the video marketplace, (2) preserving for the public the benefits of local television service, and (3) promoting the widespread dissemination of information from diverse sources. *See generally* 1992 Cable Act § 2(a). With respect to Section 5 in particular, the must carry rules also serve the goals "of furthering the educational development of all citizens and [ ] protect[ing] the nation's substantial investment in and commitment to public television services." 1992 House Report at 68; *see also id.* at 68-71; 1992 Cable Act § 2(a)(8).

As the district court correctly held, the substantiality of each of these asserted interests is "beyond dispute." J.S. App. 23a. Localism, diversity, and fair competition have served as the touchstones of Congressional regulation of the television industry — and judicial review of that regulation under the First Amendment — since 1934. *See* 47 U.S.C. § 307(b) (1988) (nationwide allocation of channels); *Metro*

Broadcasting, Inc., 497 U.S. at 567 ("the interest in enhancing broadcast diversity is, at the very least, an important governmental objective"); *Southwestern Cable Co.*, 392 U.S. at 172-74 & nn.38-39 (localism); *Associated Press*, 326 U.S. at 20 (fair competition).[39] "There can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest." *Capital Cities Cable, Inc.*, 467 U.S. at 714.

Moreover, Congress' support and encouragement of public television has long been recognized as "further[ing] the general welfare." 47 U.S.C. § 396(a)(5) (1988). More recently, in amendments to the 1934 Communications Act, Congress made the point as clearly as it can be made:

> [P]ublic television and radio stations and public telecommunications services constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs.
>
> [I]t is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies.

Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (amending 47 U.S.C. § 396(a) (1988)).

---

[39] *See also Chicago Cable Communications*, 879 F.2d at 1549 ("Encouragement of 'localism' certainly qualifies as an important or substantial interest.").

Appellants do not contest the legitimacy of Congress' interest in fostering and maintaining the nation's public television services, nor could they reasonably do so. Instead, appellants attack the sufficiency of the evidence garnered by Congress to support the Act's must carry provisions. Even if it were proper for this Court to re-weigh the factual evidence presented to Congress (which it plainly is not), appellants' claims are erroneous.

First, appellants contend that the evidence does not support the view that cable poses any threat to local broadcast programming. *See*, *e.g.*, NCTA Br. at 39-41. In making this argument, however, appellants largely ignore the record evidence that relates specifically to noncommercial television. Thus, appellants do not address the evidence before Congress demonstrating that between 1985 and 1988, 153 public television stations, nearly half of all such stations, were dropped or denied carriage 463 time by 347 cable systems. FCC Signal Carriage Survey, at 10; *see also id.* at 19 (182 public television stations involuntarily repositioned on 541 occasions between 1985 and 1988).[40] Appellants also fail to address the fact that this evidence conforms to Congress' common-sense reasoning concerning the unique economic incentives of cable operators with respect to public television stations. In short, even if appellants' arguments concerning the commercial broadcasting evidence were accurate, which they are not, it is plain that Congress made sufficient

[40] In a feeble attempt to address Section 5, appellants note that the total number of noncommercial television stations has increased since 1985. *See*, *e.g.*, NCTA Br. at 40. This isolated fact, however, says nothing about the evidence of cable's anticompetitive conduct toward public television stations or about cable's incentives to deny carriage to public television in the future. Congress may act to guard against the "dangerous probability [of attempts to monopolize] as well as against the completed result." *Swift and Co. v. United States*, 196 U.S. 375, 396 (1905).

evidentiary findings to support the noncommercial must carry rules of Section 5.[41]

Second, relying on *Century*, appellants contend that non-carriage is not a threat to broadcast television because of the alternative means available for receiving such signals over-the-air — *i.e.*, via A/B switch technology. *See* Turner Br. at 41; Time Warner Br. at 42-43. In making this claim, however, appellants fail to discuss the substantial evidence developed since *Century* — and relied on by Congress — showing that technology such as the A/B switch is not a workable solution to the threat of non-carriage. *See* 1992 House Report at 54, 70-71, 74; 1992 Cable Act § 2(a)(17)&(18). Nor, again, do appellants come to grips with the unique problems of public television — in this case, the fact that two-thirds of public television stations use the UHF band for their over-the-air transmissions, making public television signals particularly vulnerable to interference from terrain, atmospheric disturbances and man-made obstacles. *See* 1992 House Report at 70. Accordingly, public television stations are even more dependent than commercial stations on continued cable carriage of their signals.

C. Section 5 Is Not Substantially Broader Than Necessary To Achieve The Substantial Government Interest On Which It Rests.

Section 5 is also narrowly tailored to achieve the government's interest, thus satisfying the second major prong

[41] Some of appellants' contentions concerning the evidence are misleading. For example, both NCTA and Turner quote a section of the 1992 House Report for the proposition that Congress found no "widespread pattern" of carriage denials of local television stations. NCTA Br. at 40; Turner Br. at 43. However, both appellants omit the remainder of the sentence, which states that "there is ample evidence that some cable systems will refuse to carry the signals of local television stations, and that such refusal to carry poses a grave threat to the allocation system favoring local service established by Congress and the FCC." 1992 House Report at 52.

of the *O'Brien* test. In order to meet this requirement, a regulation need not be the "least restrictive" or "least intrusive" means available. *Ward*, 491 U.S. at 798. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest," the regulation will be upheld even if "a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800.

Here, Congress has carefully crafted the requirements of Section 5 to achieve its objectives with minimal burden on cable operators. Among other provisions, the must carry rules for noncommercial stations are circumscribed in the following ways:

- The number of public television stations that a cable operator must carry is limited, depending on the number of channels available on the system. 1992 Cable Act § 5(b)(1), (2) & (3).[42/]

- The cable operator is not obligated to carry substantially duplicative qualified signals. *Id.* § 5(b)(3)(C) & (E).

- If the cable operator is obliged to add a public television station under the must carry rules, it can choose to carry that station on a channel already reserved for public access programming if that channel is not being used for its designated purpose, subject to the agreement of

---

[42/] Thus, in general, systems with 12 or fewer channels are required to carry only one public television signal; systems with 13-36 channels must carry one but no more than three public television stations; and systems with more than 36 channels must carry all public television stations that request carriage.

the franchising authority. *Id.* § 5(d); *see* 1992 House Report at 100.[43/]

These limitations clearly meet the primary "tailoring" concerns of the D.C. Circuit in *Quincy*, which invalidated must carry rules that "required carriage of every local or significantly viewed signal irrespective of the number of must carry channels already being transmitted, the degree of programming duplication, or the channel capacity of a cable system." 768 F.2d at 1440.[44/] In short, there is no danger that Section 5 will cause the problem of "channel saturation" that strongly influenced the *Quincy* court to strike down the FCC's much broader must carry rules.[45/]

Section 5 is also congruent with Congress' interest in preserving and promoting localism. As Congress found, noncommercial stations have long been the beacon of localism in the television industry. Not only have they served the

---

[43/] For a cable operator with unused public access channels that equal or exceed the number of qualified local noncommercial educational television stations required to be carried (only one station for more than 80 percent of the cable systems), compliance with Section 5 will not involve any loss of cable channels. Because this is a circumstance in which a cable operator can comply with Section 5 and not suffer any of the alleged constitutional harm, appellants' facial challenge to Section 5 should be summarily rejected. *See Rust* v. *Sullivan*, 111 S. Ct. at 1767.

[44/] These limitations are also especially significant in light of the minimal burden that would be imposed on cable systems by an *unlimited* requirement to carry public television stations. *See supra* pp. 13-14.

[45/] The burden posed by Section 5 is further minimized by ongoing improvements in the channel capacity of cable systems. While the average system has a capacity of about 36 channels, some cable systems have as many as 150 useable channels. Technological developments have placed channel capacity of this magnitude within reach of nearly all cable systems, and further developments promise to provide virtually unlimited channel capacity (500 or more channels) within a few years. *See* J.A. at 109-120, 311-318. Thus, in the not too distant future, most cable systems will have the capacity to carry all broadcast signals and all cable programming. J.A. at 318.

educational and informational needs of local communities since noncommercial spectrum channels were allocated in 1952, but local governments and citizens have supported the continued provision of these services through substantial tax dollars and voluntary contributions. *See* 1992 Cable Act § 2(a)(8). In light of the economic structure and incentives of the cable industry, it cannot seriously be argued that Congress has overstepped its bounds in preserving this locally supported educational service by adopting modest must carry rules for public television stations.[46/]

Finally, appellants contend that the channel position aspects of the must carry rules do not serve the goal of promoting competition in the video services market. At the outset, it is difficult to conceive how positioning requirements burden any First Amendment interest, because they do not suppress any speech. They are quintessential structural regulations. At most, the channel positioning requirements are a reasonable time, place and manner restriction (with the emphasis on place). Viewed (charitably) in that light, the channel positioning provisions of Section 5 are clearly justified. If left unregulated, cable operators will have every incentive to shunt public stations to even less desirable channels than they currently occupy. Indeed, Congress cited evidence that over 200 noncommercial educational stations were repositioned since 1985 by cable operators. *See*

[46/] This analysis is not affected by Judge Williams' dissenting view that the leased access scheme created by § 612 of the 1984 Cable Communication Policy Act, 47 U.S.C. § 532 (1988), is a less restrictive means of achieving the congressional interests underlying must carry. The leased access regime requires dedication of up to 15% of a cable operator's channel capacity to unaffiliated programmers. That percentage will almost always be more onerous than the *de minimis* requirements of Section 5. *See supra* pp. 13-14. Further, because cable operators retain the discretion to decide which unaffiliated programmers will obtain access under § 612, that provision does not address the anticompetitive practices and incentives attacked by Section 5. Accordingly, leased access provisions are not less restrictive than Section 5, nor are they as effective in achieving the governmental interests addressed by Section 5.

1992 House Report at 71; *see also* FCC Signal Carriage Survey at 19. Under these circumstances, the channel position requirements are clearly no broader than necessary to support the government's interest in meaningful access to public television services.

CONCLUSION

For the reasons stated above, the Court should affirm the district court's judgment upholding the constitutionality of Section 5.

Respectfully submitted,

Of Counsel:

MARILYN MOHRMAN-GILLIS
ASSOCIATION OF AMERICA'S
PUBLIC TELEVISION STATIONS
Suite 200
1350 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 887-1700

PAULA A. JAMESON
NANCY HOWELL HENDRY
PUBLIC BROADCASTING SERVICE
1320 Braddock Place
Alexandria, Virginia 22314
(703) 739-5000

THOMAS E. HARVEY
PAMELA J. BROWN
CORPORATION FOR PUBLIC
BROADCASTING
901 E Street, N.W.
Washington, D.C. 20004
(202) 879-9600

MARK H. LYNCH*
RICHARD W. BUCHANAN
COVINGTON & BURLING
Post Office Box 7566
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting

Dated: December 7, 1993

* *Counsel of Record*